

# *Nova Law Review*

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*Volume 12, Issue 3*

1988

*Article 15*

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## Emerging Issues of AIDS and Insurance

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## **Abstract**

The public focus thus far in the AIDS crisis has been primarily on two legal issues: employment discrimination and education.

**KEYWORDS:** AIDS, insurance, issues

## Emerging Issues of AIDS and Insurance

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The public focus thus far in the AIDS crisis has been primarily on two legal issues: employment discrimination and education. Employment issues capture our attention because of the potential threat to every person's job or, conversely, because of fears of being exposed in the workplace due to a co-worker's infection. School issues — both the rights of AIDS-infected students to attend regular classes and the rights of AIDS-infected teachers and administrators to continue to perform their jobs, the latter really a sub-issue of employment discrimination — touch that segment of society about which we are most protective, our children. Issues of AIDS and insurance, on the other hand, occupy a less visible role, but their importance must not be underestimated. The impact of a loss of or reduction in insurance coverage can be financially and emotionally crippling, with spillover effects upon one's physical health as well.

Early in the AIDS chronology, a vice president of the General Reassurance Corp., of Stamford, Connecticut, acknowledged that his company would not write life insurance policies for those diagnosed as having AIDS, according to an item in the *AMERICAN BAR ASSOCIATION JOURNAL*. Similar statements came from the chief medical director for Lincoln National Life Insurance Co., of Fort Wayne, Indiana. Both were apparently trying to screen applications from single men in New York City, San Francisco, Washington, D.C., Los Angeles, Houston, Newark and Miami, cities which then had about 80% of the re-

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Mr. Terl is a former President of the Broward County Chapter of the American Civil Liberties Union and a former Vice President of the ACLU of Florida. In addition, he serves as an active member of the national ACLU Task Force on AIDS.



ported AIDS cases.

Of course, denying life insurance to one with AIDS and denying life insurance to one who may be in a "high risk group", as that phrase was initially used, are very different concepts, but these insurers seemed not to be able — or willing — to distinguish among those who even might be at any point along a continuum from gay to seropositive but asymptomatic to diagnosed with AIDS-related complex ("ARC") to diagnosed with full-blown AIDS.

Since these early examples of insurers' concerns about AIDS, the development of knowledge about the disease has had no clearly directional impact upon insurance issues. Several jurisdictions have acted with logic and compassion; one group of insurance industry officials has at least attempted to lead insurers in a reasonable and sensible direction; and insurers themselves have generally persisted in protection of their pocketbooks, with minimal regard for what others consider to be fairness or the underlying principles on which insurance is supposed to be based.

In April, 1987, the Lambda Legal Defense and Education Fund, a gay rights organization, reported that an Abilene, Texas, man had filed an administrative complaint against the National Home Life Insurance Company for refusal to sell him life insurance because he named a same-gender roommate as his beneficiary. The complaint alleges a violation of the Texas Insurance Code, which allows an insured to designate any beneficiary and prohibits "unfair discrimination".

At about the same time, Lambda filed suit in federal district court on behalf of an insurance applicant who was tested for HIV antibodies without his consent. The insurer, Prudential Insurance Company of America, subsequently denied the applicant's insurance request after he tested positive. The suit further alleged that Prudential staff informed the plaintiff's own insurance agent and others that the plaintiff had tested positive, that the test confirmed that the applicant was gay and that the application had been used for training purposes in a Prudential office in Pennsylvania without any attempt to conceal the applicant's identity.<sup>1</sup> The case was settled later in the year, with the terms of the settlement withheld as confidential.

In early Summer, 1987, the California Department of Insurance ordered the AETNA Life and Casualty Company to process an application for life insurance without requiring HIV antibody testing. The

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1. Doe v. Prudential Insurance Co., No. 87 Civ. 2040 (S.D.N.Y. filed March 26, 1987).



action was taken in response to an administrative complaint, which charged AETNA with bad faith and fraudulent practices in violation of state law. The complaint was filed by National Gay Rights Advocates ("NGRA") on behalf of an insurance applicant whose application was not processed because he would not consent to HIV antibody testing within the required general blood testing.

Also in California, a complaint was filed with the state Department of Corporations alleging redlining by HealthAmerica, a health maintenance organization. According to reports, a former employee of the HMO was told to store all individual applications from San Francisco for an appropriate period so as to give the appearance that medical histories were being checked and to then send out rejection letters implying that medical histories had disqualified the applicants.

California, in particular, has been the site of various tests of insurance applicants. That jurisdiction has certain aspects of state civil rights laws as well as ordinances in several of the state's municipalities prohibiting discrimination on the basis of sexual orientation. Such specific protections against discrimination were cited in a suit filed by NGRA and the Employment Law Center in San Francisco Superior Court against the Great Republic Life Insurance Company. The suit arose when an insurance applicant refused to answer a supplemental questionnaire and was, therefore, denied health insurance coverage. According to a memorandum sent by the company to its agents, the questionnaire was required from single males who fit a certain profile, which included "antique dealers, interior decorators, florists, restaurant employees, consultants and people in the jewelry and fashion business".

Two companies which persisted in questioning applicants on whether or not they had tested positive for HIV antibodies have been particular targets of NGRA. Simultaneous complaints were filed against the Kentucky Central Life Insurance Company, of Lexington, Kentucky, and the Protective Life Insurance Company, of Birmingham, Alabama, asking the insurance commissioners of ten states and the District of Columbia to prevent these companies from asking such questions. Questions about prior HIV antibody tests are — or at least were — banned by law in California,<sup>2</sup> Maine,<sup>3</sup> Wisconsin<sup>4</sup> and Washington, D.C.,<sup>5</sup> and the insurance departments of seven other states —

2. CAL. HEALTH AND SAFETY CODE § 199.21(f) (Deering Supp. 1987).

3. ME. REV. STAT. ANN. tit. 5, § 19204 (Supp. 1987).

4. WISC. STAT. ANN. § 631.90 (West Supp. 1987).

5. D.C. CODE ANN. § 35-223(b)(2) (Supp. 1987).



Notwithstanding the NAIC guidelines, 86% of commercial insurers try to identify applicants who have been infected with HIV, according to the report released on March 14, 1988, by the Congressional Office of Technology and Assessment. Approximately half of the 61 companies responding to the survey said they routinely require some applicants, usually men, to undergo HIV antibody tests. Almost one-third consider sexual orientation as a factor in underwriting decisions.

The Florida Insurance Commissioner has issued an informational bulletin adopting the NAIC guidelines,<sup>8</sup> but even that seemingly strong action has only a limited effect for several reasons. First, out-of-state group policies and ERISA plans are provided statutory exemptions from most of the Florida Insurance Commissioner's regulatory authority. Second, it would seem that the news of the Florida action was disseminated to insurers regulated by the Florida Department of Insurance and to the public through the Florida Administration Weekly. However, those who might need to invoke their rights against the discrimination which the NAIC model guidelines were designed to protect received no specific word of the adoption of the Informational Bulletin. Indeed, the news editor of *The Weekly News*, Florida's statewide newspaper for the gay community, was entirely unaware of the Bulletin when it was brought to his attention. One must observe that rights specifically communicated to only those in a position to commit infringements of those rights are unlikely to be enforced.

Do Florida residents need to worry about the inter-relationship between AIDS and insurance issues? Most certainly they do, but perhaps less so than previously.

The inquiry which led to my own knowledge of the Informational Bulletin arose when I received an ACLU complaint from a hair salon employee who works for a local shop within a nationwide chain. All employees in the chain's South Florida shops had received a notice that the company's group health policy was being amended to delete coverage for expenses from any AIDS-related illness, a change of extremely heavy impact to employees in the hair care industry. Though the specific policy may have been beyond the regulatory authority of the Florida Insurance Commissioner, the public outcry led by the ACLU ultimately generated a company change of heart and a change of coverage to again include AIDS-related expenses.

Other complaints to the Florida ACLU have also involved employ-

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8. No. 87-206, issued July 9, 1987.



ers changing from one group policy which covers AIDS-related expenses to another which does not, a practice now under broad attack in a case being brought in Florida by NGRA. Another large area for worry involves governmental units proposing to amend the terms of their pre-employment physicals to include HIV antibody testing, a proposal already made by the city of Hollywood but which was dropped at least for the time being.

At least the former issue is likely to be resolved prospectively if regulations proposed by the Florida Insurance Commissioner on November 19, 1987, are adopted.<sup>9</sup> Those proposed regulations provide that AIDS treatment expenses must be covered just as would be any other illness or disease within a general health or life insurance policy. Moreover, insurers would not be able to use selective AIDS testing to exclude individuals from group insurance plans — *i.e.*, the entire group would have to be tested. If there is to be testing for AIDS antibodies, that would have to be disclosed in advance and an applicant's written consent obtained. The test could not be required because of an applicant's lifestyle, sexual preference or occupation and must be based upon medical reasons, thus effectively incorporating into the regulatory scheme the substance of the Informational Bulletin. All AIDS antibody test results would have to be confidential.

The regulatory proposal stops short of banning the AIDS antibody test entirely as a few states have done, but the general thrust of the proposal goes far towards banning discriminatory use of the tests and discriminatory use of insurance coverage. An estimated 73 percent of Floridians with health insurance are covered by group plans and would be protected by the new regulations. However, an insurance applicant's knowledge of a prior positive antibody test could still be sought, as could information about prior AIDS symptoms, either of which could presumably be the basis for finding a pre-existing condition and the elimination of coverage for AIDS-related expenses under those circumstances.

Alternatively, the House Legislative Task Force on AIDS is preparing for the 1988 session of the Florida Legislature comprehensive legislation on AIDS, including treatment of insurance issues generally along the same lines as were proposed by the Insurance Commissioner.

Your author submits that there are sound policy reasons for prohibiting both the questioning of insurance applicants as to any

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9. Fla. Admin. Weekly, Vol. 14 No. 5 (Feb. 5, 1988) pp. 325-327.



knowledge they may have regarding their HIV antibody status and the requirement that insurance applicants actually submit to HIV antibody testing. For a scholarly analysis of the underlying policy reasons, see Ben Schatz's fine Harvard Law Review Commentary.<sup>10</sup> Even without going into such detail, however, one should be able to accept a basic premise that insurance is designed to spread the cost of health care throughout the general population. One should further be able to accept the findings of the Florida House of Representatives' Committee on Health and Rehabilitative Services ("HRS") report on legislation which became Florida Statutes § 381.606. As far back in the AIDS crisis as 1985, this report properly acknowledged that the HIV antibody test does not test for the AIDS virus itself and was meant to be used only for the screening of blood. Even more importantly, that law provides that the results of a serologic test cannot be used to determine, among other things, whether a person may be insured for disability, health or life insurance. Unfortunately, the statutory provision is apparently applicable to only tests performed at the so-called "alternative testing sites" set up pursuant to a declaration by the Secretary of the Department of HRS of a threat to the public health. The results of tests performed at other sites or from other sources may still apparently be used as a basis for denial of insurance. Until such time as the Florida Legislature or Insurance Commissioner acts to prohibit presently permissible questioning of insurance applicants and the use of HIV antibody tests in insurance underwriting, we all remain in jeopardy of the dire consequences of uninsurability or, if already insured, being dropped from coverage.

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10. Schatz, *supra* note 6.